



THE SUPREME COURT TURNS ITS ATTENTION TO AUER DEFERENCE

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On Dec. 10, 2018, the Supreme Court granted certiorari in *Kisor v. Wilkie*.¹ All judges and lawyers who interact with the administrative state directly or on behalf of clients should pay attention to its resolution.

The case involves a U.S. Marine Corps Vietnam War veteran who suffers from post-traumatic stress disorder (PTSD). In 1982, the petitioner filed a claim for Veterans Affairs (VA) disability benefits but was denied because of insufficient proof that he suffered from PTSD. After the petitioner identified missing service department records, his claim was reopened under 38 C.F.R. § 3.156(a), which allows for reopening when a claimant submits “new and material evidence,” and not § 3.156(c), which allows for reopening when VA fails to consider relevant service department records that were in existence at the time of an initial decision. This means that the petitioner’s “effective date” (the date used to determine when his benefits begin) is June 2006, rather than a date in 1983. This difference could amount to tens of thousands of dollars in disability benefits.²

But that’s not why the Court granted certiorari. Nor is it why several amici, including 19 states, the U.S. Chamber of Commerce, and the National Association of Home Builders, have filed briefs in support of the petitioner. No, these amici—and the broader legal community—are interested in this case because it presents the Court with an opportunity to overrule (or, at the very least, modify) *Auer* deference.³

This is so because the VA “reopened” Kisor’s claim under § 3.156(a) rather than “reconsidered” his claim under § 3.156(c). The VA’s choice was dictated by its own interpretation of the meaning of “relevant” in § 3.156(a). On appeal to the Federal Circuit, the petitioner argued that “relevant” should carry its legal definition under the Federal Rules of Evidence. That is, information must have “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable.”⁴ The VA (through the Board of Veterans’ Appeals), however, took the position that information is relevant when it is “outcome determinative,” meaning that it “manifestly change[s] the outcome of the decision.” Both interpretations, according to the Federal Circuit, were “reasonable” and, thus, the agency’s should prevail.⁵

What the Court does will likely echo far beyond the field of veterans’ benefits law.

Auer Deference

First, a quick refresher on what exactly *Auer* held. The 1997 case involved a group of city police sergeants who were suing for overtime benefits. The Secretary of Labor interpreted a statute to exclude police sergeants from the Fair Labor Standard Act’s overtime protections. The Court upheld the Department of Labor’s interpretation, creating the framework for determining whether agency deference is owed that is still in place today. That framework requires courts to uphold an agency’s interpretation of its own regulation provided (1) Congress has not spoken directly on the issue and (2) that the interpretation is based on a permissible reading of the regulation.⁶

Amici

Five amici submitted briefs to the Supreme Court, urging the Court to hear *Kisor*. Here are summaries of three to get a sense of the arguments they presented.

The States

Led by Utah, 19 states rallied behind the veteran petitioner, citing their concerns as sovereigns. They implored the Court to grant the petition for certiorari so it could address the federalism and separation of powers issues that *Auer* deference spawns. The states raised several arguments in favor of overruling *Auer* deference. They first argued that *Auer* deference impedes their ability to vindicate their interests in ensuring that the federal government produces supreme federal law pursuant to constitutional processes. And they contended it furthers the administrative state's encroachment on means of the lawmaking such that it displaces state law far beyond bicameralism and presentment, formerly the only means for the federal government to impose its will on the states. *Auer*, in their view, is "two steps removed" from constitutional lawmaking, and must be reconciled with the inverse prohibition on the president. They noted that agencies "lack the same institutional incentives" that motivate members of Congress to respect states' interests. *Auer* enables agencies to play both lawmaker and judge, both making law and saying what the law is.⁷

U.S. Chamber of Commerce

The U.S. Chamber of Commerce also filed an amicus brief in support of the petitioner. Administrative agencies touch almost every business in some respect. The Chamber echoed the states' concerns about notice and participation through notice-and-comment rulemaking, as well as the benefits from clear and consistently applied rules. Additionally, it noted the difficulty of keeping current on agency changes in interpretation because changes can occur potentially in a host of sources outside of publication in the Federal Register. The Chamber also argued that *Auer* conflicts directly with § 706 of the Administrative Procedure Act, which requires a reviewing court to interpret agency action. Thus, those decisions lack the solid reasoning that leads to *stare decisis* value.⁸

National Association of Home Builders Et Al.

The National Association of Home Builders submitted an amicus brief on behalf of a group of business associations. Federal agencies regulate them, so they have an interest in making sure regulation happens in a "direct, clear, fair, and lawful manner." *Auer* deference, in their view, absolves agencies of the responsibility, which notice-and-comment rulemaking imposes, for creating a judicially reviewable record of agency action. The associations requested an abandoning or significant narrowing of *Auer*. They focused on real-world consequences by profiling a variety of cases in which *Auer* determined the outcome and caused economic harm to the regulated community members. They also wrote of the impact that *Auer* has on their routine interactions with federal agencies. They contend that *Auer*'s most significant implication is not that it helps agencies win fights in court, but rather that it dissuades regulated parties from bringing suit at all. *Auer* has created "litigation fatigue," removing a "crucial check on administrative overreach." They highlighted the power to change interpretation with retroactive effect to make the point that *Auer* is always a risk factor for businesses.⁹

Kisor's Implications

Even though *Kisor* is a veterans' benefits case on its facts, the law of *Auer* deference at play in the case impacts virtually every corner of the country. Recent cases decided on *Auer* grounds include food and drug development,¹⁰ immigration appeals,¹¹ labor and employment,¹² and patent law.¹³ Further, it's unclear what effect overturning or modifying *Auer* would have on the multitude of cases decided on deference grounds. It's possible those decisions could be relitigated, spawning a new era of litigation. What's clear is that the Court has taken aim at *Auer*. Practitioners should take notice. ☉



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Endnotes

¹*Kisor v. Wilkie*, No. 18-015 (U.S. Aug. 1, 2018).

²See Petition for a Writ of Certiorari, *Kisor*, No. 18-015.

³*Id.*

⁴Fed. R. Evid. 401.

⁵See *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017).

⁶*Auer v. Robbins*, 519 U.S. 452 (1997).

⁷Brief for the State of Utah et al. as Amici Curiae Supporting the Petitioner, *Kisor*, No. 18-015.

⁸Brief for the Chamber of Commerce of the U.S. as Amicus Curiae Supporting the Petitioner, *Kisor*, No. 18-015.

⁹Brief for the National Association of Home Builders et al. as Amici Curiae Supporting the Petitioner, *Kisor*, No. 18-015.

¹⁰See *Eisai Inc. v. U.S. Food & Drug Admin.*, 134 F. Supp. 3d 384 (D.C. Cir. 2015).

¹¹See *Mirror Lake Village v. Nielson*, 345 F. Supp. 3d 56, (D.D.C. Dec. 14, 2018).

¹²See *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018).

¹³See *In re Lovin*, 652 F.3d 1349 (Fed. Cir. 2011).